BOLLING CONSTRUCTION CO. AND BOB BOLLING

IBLA 90-363 Decided March 16, 1993

Appeal from a decision of the Area Manager, Stateline Resource Area, Nevada, Bureau of Land Management, assessing damages for willful trespass. NV-050-4-525.

Affirmed as modified.

1. Administrative Authority: Generally -- Appeals: Jurisdiction -- Board of Land Appeals -- Judicial Review -- Trespass: Generally

   A statute establishing time limitations for the commencement of judicial actions for damages on behalf of the United States does not limit administrative proceedings within the Department of the Interior.

2. Trespass: Generally -- Trespass: Measure of Damages

   A trespass is properly considered willful where the trespasser ignores its mineral materials sales contract's authorized quantity and expiration date and removes mineral material in excess of the stated contract amount over a 5-year period after the contract expires.

APPEARANCES: Miriam F. Penney, Esq., Las Vegas, Nevada, for appellants.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Bolling Construction Company and Bob Bolling (referred to collectively as Bolling) have appealed from an April 20, 1990, decision of the Stateline Resource Area Manager, Las Vegas, Nevada, District Office, Bureau of Land Management (BLM), assessing $190,325.87 in willful trespass damages for the unauthorized removal of 46,603 cubic yards (cy) of mineral material from the Pahrump Community Pit located in the W 1/2 SW 1/4 sec. 28 and the SE 1/4 sec. 29, T. 20 S., R. 54 E., Mount Diablo Meridian, Nye County, Nevada.

On July 27, 1984, Bolling contracted with BLM to purchase 1,500 cy of sand and gravel from the Pahrump Pit for $ .20 per cy (Vegetative or Mineral

Material Negotiated Cash Sale Contract No. 241325). 1/ The contract appears to have expired by its own terms on September 26, 1984. 2/

On November 3, 1989, BLM issued Trespass Notice NV-050-4-525 charging Bolling with trespass for the unauthorized removal of mineral materials from the Pahrump Community Pit. BLM granted Bolling 5 days from receipt of the notice to present evidence or information demonstrating that no trespass had occurred and to supply all information necessary to effect a settlement for trespass damages, including all sales and haul records from the pit for the period from January 1, 1987, to November 3, 1989.

In a November 6, 1989, Mineral Appraisal Report, BLM evaluated comparable sales data and established the value for the materials removed from the pit. The appraisal set a value of $1.50 per cy of mineral material for innocent trespass. For willful trespass, BLM divided the material into three categories with the following values: Reject sand - $5.24 per cy; Type II Material - $4.01 per cy; and Non-identified Sales (sales not designated as either reject sand or Type II material) - $4.59 per cy. In a supplemental mineral appraisal dated December 13, 1989, BLM established the value for pit run material at $2.29 per cy.

Bolling responded to BLM's trespass notice by submitting data concerning the volume of material removed from the pit. This information included a March 23, 1990, report from Triangle Surveying which, based on a survey of the pit and the stock pile area, calculated the pit's volume as 60,541 cy and the stock pile's volume as 13,938 cy, 3,024 cy of which was determined to be pit run gravel.

BLM based its April 20, 1990, decision on the information contained in the letter from Triangle Surveying which it accepted as complete. BLM found that Bolling had committed an act of willful trespass by removing mineral material from the Pahrump Community Pit without the benefit of a mineral materials sales contract. BLM determined that Nevada State law did not prescribe the measure of trespass damages for mineral materials, 3/ and that, therefore, Bolling would be assessed "the full value of the material at the time of sale (conversion) without a deduction for labor bestowed or expense incurred in removing and marketing the material" (Decision at 2), the measure of damages provided in 43 CFR 9239.1-3 (1988). 4/

1/ Bolling submitted a copy of this contract with its appeal. BLM's case file neither contains a copy of this contract nor mentions its existence.

2/ Because of the poor quality of the copy of the contract, the expiration date is barely legible.

3/ Under 43 CFR 9239.0-8, the measure of damages prescribed by the laws of the state in which the trespass occurs applies in mineral material trespass cases unless Federal law prescribes or authorizes a different rule.

4/ The measure of damages provided in 43 CFR 9239.1-3 (1988) applies to timber trespass cases when no state law governs such trespass. Although BLM erroneously concluded that Nevada State law did not address the question of appropriate mineral trespass damages, the rule in Nevada that the

BLM found that Bolling had removed 46,603 cy of unauthorized material from the pit by means of willful trespass. 5/ BLM estimated that, based on its analysis of the stockpiled material on the site, approximately 22 percent, or 10,253 cy, of the 46,603 cy removed was pit run material. Since Bolling had not provided sufficient information for BLM to determine how much of the rest of the removed material was Type II or Reject Sand, BLM considered the remaining 36,350 cy of removed material as undefined. Using the values established in the mineral appraisal reports, BLM assessed Bolling $166,846.50 for the undefined material and $23,479.37 for the pit run material for a total of $190,325.87 in damages for the removal of 46,603 cy of mineral material by means of a willful trespass.

On appeal Bolling argues that the 3-year statute of limitations for trespass actions limits BLM's recovery to damages for only those materials removed from the pit between November 4, 1986, and November 3, 1989. In order to properly calculate the volume of material removed during the relevant time period, Bolling contends that the total cubic yardage involved must be prorated from July 27, 1984, the date it first extracted mineral materials from the pit pursuant to a contract for the sale of 1,500 cy of material, to November 3, 1989. Since the removal of 1,500 cy was authorized, Bolling computes the portion of the remaining 45,103 cy of removed material attributable to the 3-year limitation period as 25,656 cy.

Bolling claims that its trespass was innocent, not willful, and that it should, therefore, only be required to pay the value of the minerals in place instead of the full value of the material at the time of sale. Bolling asserts that it obtained a permit on July 27, 1984, at which time it was assigned its own section of the Pahrump Community Pit, and that it assumed that it would be invoiced by BLM for the actual amount of material removed from its identifiable area. According to Bolling, section 1(c) of its permit stated that if the total amount of material removed exceeded the estimated quantity, the additional units would be subject to the $0.20 per cy contract charge. Bolling maintains that it construed this provision to mean that BLM would bill Bolling for such additional units.

Bolling suggests that damages for the material removed by its innocent trespass should be calculated on the price basis of $0.20 per cy for material removed from November 4, 1986, through December 31, 1988, $0.80 per cy for material removed from January 1 through July 10, 1989, and $1.25 per cy for material removed from July 11 through November 3, 1989, for a total of

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fn. 4 (continued)
willful trespasser is charged for the value of the material after it has been extracted and sold, with no deduction for the costs of extracting and marketing, is identical to the rule applied here by BLM. See Frehner Construction Co., 124 IBLA 310, 313 (1992).

5/ BLM apparently computed this number by subtracting the amount of stockpiled material identified in the Triangle Surveying letter (13,938 cy) from the total volume of the pit as determined in that letter (60,541 cy).

$10,670.08. 6/ Based on this analysis, Bolling expresses its willingness to settle this matter for $10,670.08, but states that should its offer not be accepted, it "is prepared to litigate the issues of willful trespass and the market values assigned to processed material, as well as the allocation of that material between 'pit run' and 'undefined'" (Statement of Reasons at 2).

The regulation at 43 CFR 3603.1 defines unauthorized use as the extraction, severance, or removal of mineral materials from public lands under the jurisdiction of the Department of the Interior, unless authorized by sale or permit under law and Departmental regulations, and provides that unauthorized users are liable for damages to the United States. Under 43 CFR 9239.0-7, such unauthorized removal of mineral material from public land constitutes an act of trespass for which the trespasser is liable in damages to the United States.

Although Bolling initially began excavating mineral material from the Pahrump Community Pit on July 27, 1984, pursuant to a sales contract issued by BLM authorizing the removal of 1,500 cy of material, it admits that it continued to remove mineral material long after the September 26, 1984, expiration date of the contract. Thus Bolling's removal of mineral material in excess of 1,500 cy after the contract expired was unauthorized and constituted an act of trespass for which it is liable in damages to the United States. See 43 CFR 3603.1.

[1] Bolling argues, however, that even though its trespass commenced in 1984, the 3-year statute of limitations prevents BLM from recovering damages for materials removed before November 4, 1986. 7/ We reject this argument. Statutes of limitations may apply to judicial enforcement of administrative actions, but not to the underlying administrative actions. See Anadarko Petroleum Corp., 122 IBLA 141, 147-48 (1992), and cases cited therein. Accordingly, Bolling is liable for damages for all the unauthorized mineral material it removed from the Pahrump Community Pit.

[2] We find no merit in Bolling's contention that its trespass was innocent, not willful. Willfulness is demonstrated by conduct which negates the conclusion that a trespasser acted in good faith or innocent

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6/ Bolling does not explain how it arrived at those prices and timeframes. 7/ Bolling does not cite the statutory basis for its claim that the limitation period for trespass actions is 3 years. To the extent Bolling may be referring to the 3-year limitations period for tort actions brought by the United States found at 28 U.S.C. § 2415(b) (1988), we note that the first proviso of that section establishes a 6-year limitations period for actions to recover damages resulting from a trespass on lands of the United States. Since Bolling commenced its unauthorized removal of the material within 6 years of BLM's trespass notice, even if the limitations period were applicable in this administrative proceeding, Bolling would be liable for damages for all the unauthorized material.

mistake, and may also be shown by conduct so lacking in reasonableness or responsibility that it became reckless or negligent. See Western States Contracting, Inc., 119 IBLA 355, 357 (1991); Herrera v. BLM, 38 IBLA 262, 267 (1978); Eldon Brinkerhoff, 24 IBLA 324, 338, 83 I.D. 185, 191 (1976). In this case, Bolling ignored its sales contract's authorized quantity and expiration date, and continued to remove material from the pit for over 5 years. Although Bolling contends that it believed it would be invoiced for any additional material removed from the pit, BLM's failure to bill Bolling for the excess material removed during the 5-year period fatally undercuts the reasonableness of Bolling's belief. Thus, we conclude that Bolling's trespass was the result of a reckless disregard of the expiration date and quantity limits of its contract and was therefore willful. See Frehner Construction Co., 124 IBLA 310, 316-17 (1992). Accordingly, we affirm BLM's assessment of damages based on willful trespass.

One aspect of BLM's decision must be modified, however. In its computation of the volume of material taken by willful trespass, BLM failed to subtract the 1,500 cy of material authorized by Bolling's July 27, 1984, cash sales contract. Thus the correct total volume of unauthorized material removed by Bolling is 45,103 cy, 22 percent of which, or 9,923 cy, is pit run material and the remaining 35,180 cy of which is undefined material. 8/ Based on the values for willful trespass established in BLM's mineral appraisal reports, Bolling owes $161,476.20 (35,180 cy at $4.59 per cy) for the undefined material and $22,723.67 (9,923 cy at $2.29 per cy) for the pit run material for a total of $184,199.87 in damages for its unauthorized removal of 45,103 cy of mineral material from the Pahrump Community Pit.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified by this decision.

John H. Kelly
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

8/ Although Bolling states that it is prepared to litigate BLM's allocation of the materials between pit run and undefined, as well as the market values assigned to the material, it has presented no arguments on these issues in this appeal. Accordingly, we accept BLM's allocation formula and its appraised value determinations.